Supreme Court, U. S.
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No. 80-163

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

IN RE

CHESTNUTT MANAGEMENT CORPORATION,

Petitioner,

—v.—

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS AND BRIEF IN SUPPORT THEREOF

Dated: July 28, 1980

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Questions Presented for Review Upon Petition for Writ of Mandamus

When this Court

(a) necessarily decided that it had jurisdiction of this case, thereby deciding that the judgment below upon a general jury verdict did not rest upon any adequate non-federal ground, in the very grant of the writ of certiorari in No. 78-463, and

(b) exercised this Court's jurisdiction and power to vacate a judgment upon a general jury verdict of October 1975 for exactly $53,000 upon a non-existent federal claim under the Investment Advisers Act by this Court's order of November 26, 1979 reading (444 U.S. ——, 100 S.Ct. 443):

> "78-463 *Chestnutt Management Corp.* v. *Miller.* The motion of Investment Counsel Association of America, Inc. for leave to file a brief, as *amicus curiae* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. —— (1979)."

(1) Whether Respondent Judges Timbers, Van Graafeiland and Waterman proceeded outside and in excess of their jurisdiction to provide a retroactive cure for a general jury verdict in October 1975 upon a non-existent federal claim and to determine March 31, 1980 that their earlier judgment of April 3, 1978 upon the identical October 1975 general verdict for $53,000 "remains unaffected" by this Court's mandate, whereby said Respondents effectively

overruled and reversed this Court's necessary determination of and exercise of its jurisdiction in vacating the judgment of April 3, 1978, and whereby said Respondents necessarily held that the writ of certiorari was improvidently granted, since, as Respondents necessarily and expressly held, such general verdict could be sustained as resting upon an adequate nonfederal ground which they reiterated March 31, 1980.

(2) Whether said Respondents compounded their defeat of this Court's appellate jurisdiction by their disregard of an unbroken line of decisions as to general verdicts, as, for example, expressed in *Sunkist Growers, Inc.* v. *Winckler & Smith, etc.*, 370 U.S. 19 (1962) at 29-30:

> "Since we hold erroneous one theory of liability upon which the general verdict may have rested—a conspiracy among petitioners and Exchange Lemon—it is unnecessary for us to explore the legality of the other theories. As was stated . . . in *Maryland* v. *Baldwin*, 112 U.S. 490, 493, 5 S.Ct. 278, 28 L.Ed. 822 (1884), '[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld . . .'"

and never questioned in this Court as the supreme law of the land as to jury verdicts under the Seventh Amendment to the Constitution of the United States.

(3) Whether this Court should treat this petition as one for certiorari (*Collier* v. *United States*, 382 U.S. 890 (1965)) and now consider the award of punitive damage for publication of opinion as already granted in our petition filed September 18, 1978. See *Hughes Tool Co.* v. *TWA*, 409 U.S. 363, 364, Note 1 (1973); *New York Times*

Co. v. *Sullivan*, 376 U.S. 254 (1964); *Virginia State Board of Pharmacy* v. *Virginia City Consumers Council, Inc.*, 425 U.S. 748 (1976); *Carey* v. *Population Service International*, 431 U.S. 678 (1977); *First National Bank, etc.* v. *Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison, etc.* v. *Public Service Commission, etc.*, —— U.S. ——; and *Central Hudson Electric & Gas Co.* v. *Public Service Commission, etc.*, —— U.S. ——, both decided June 20, 1980.*

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* Petitioner's Supplemental Brief in Support of Petition for Certiorari dated October 15, 1979 commenced (pp. 1-2):

"Probable jurisdiction noted October 1, 1979 in *Consolidated Edison, etc.* v. *Public Service Commission of New York* (No. 79-134) is even more important than decisions* on 'implication' and 'securities laws.'

* * *

Con Edison, supra, is classic prior restraint.

This *Chestnutt* case is classic punishment for opinion published to the world. It was pleaded, tried, charged to the jury and affirmed on appeal as unorthodox opinion.

* * *

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* We include reference to:

Touche Ross & Co. v. *Redington, Trustee, et al.* (No. 78-309) —— U.S. ——, 99 S.Ct. 2479 (1979).

Burks v. *Lasker* (No. 77-1724) —— U.S. ——, 99 S.Ct. 1831 (1979).

Cannon v. *Univ. of Chicago* (No. 77-926) —— U.S. ——, 99 S.Ct. 1946 (1979).

Teamsters v. *Daniel* (No. 77-753) —— U.S. ——, 99 S.Ct. 790 (1979)."

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HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The petitioner moves this Court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable William H. Timbers, Honorable Ellsworth A. Van Graafeiland, Honorable Sterry R. Waterman, Circuit Judges, and the Honorable United States Court of Appeals for the Second Circuit, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why

your petitioner should not have such other and further relief in the premises as may be just and meet.

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Decisions Below

This Court's order of November 26, 1979 vacated a judgment reported at 578 F.2d 1386, reflecting an unreported oral decision from the bench printed A23-A25 to Petition in No. 78-463 affirming judgment on a general jury verdict.

The Memorandum Decision and Order on remand from this Court is unreported and is printed herewith as mandamus appendix pp. 1a-3a hereto.

Supreme Court Order and Judgment of November 26, 1979

"78-463 *Chestnutt Management Corp.* v. *Miller.* The motion of Investment Counsel Association of America, Inc. for leave to file a brief, as *amicus curiae* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. —— (1979)."

Jurisdictional Statement

The Order on Remand from the Supreme Court was made and entered March 31, 1980 (Mand.Ap., pp. 1a-3a hereto). A timely petition for rehearing with *en banc* suggestion was denied May 28, 1980 (Mand.Ap., pp. 4a-5a hereto).

Jurisdiction is conferred by 28 U.S.C. §1651(a). In the event this petition for mandamus is treated as a petition for certiorari jurisdiction is conferred by 28 U.S.C. §1254(1).

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CHESTNUTT MANAGEMENT CORPORATION,

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HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

PETITION FOR A WRIT OF MANDAMUS

(1) On November 26, 1979 this Court made its order in this case (No. 78-463, *Chestnutt Management Corp.* v. *Miller*) quoted in our "Questions Presented for Review" whereby this Court vacated the judgment below and ordered reconsideration in light of a decision holding that there was no federal cause of action for money damage under the Investment Advisers Act (15 U.S.C. 80b, *et seq.*). Respondent Judges upon cross motions of the parties by order dated February 8, 1980 directed filing of supplemental

briefs and on March 31, 1980 affirmed the judgment of the District Court (mandamus appendix hereto pp. 1a-3a). Petitioner's timely petition for rehearing with *en banc* suggestion was denied May 28, 1980 (mandamus appendix hereto pp. 4a-5a).

(2) The petition for certiorari No. 78-463 was filed September 18, 1978 and petitioner thereafter filed a reply brief in support of petition dated November 2, 1978, and in light of intervening decisions of this Court and reargument had in *Transamerica Mortgage Advisors Inc.* v. *Lewis*, petitioner filed a supplemental brief dated October 15, 1979 containing a supplemental appendix of the pleadings (A31 through A42). The appendix to the petition for certiorari (and bound therewith) contained the following:

APPENDIX

1. Ex. 4—Profiting from Stock Market Psychology A1
2. Petitioner's Proposed Charges A8
3. District Judge's Charges A11
4. District Court Denial of Motion n.o.v., etc. A18
5. Court of Appeals Judgment A19
6. Denial of Rehearing A21
7. Panel Decision Dictated from Bench A23
8. Statutory Appendix A26

(3) The petition for certiorari argued and presented the question (pp. 2-3) whether petitioner's First Amendment rights had been violated by punishment for publishing financial opinion (also fairly including violation of due process rights for "vagueness" in failure to allege purported fraud with the "particularity" required by Rule

9(b) F.R.Civ.Pr.). A second question presented was whether the Investment Advisers Act permitted this first money judgment in four decades.

(4) Respondent Miller's brief in opposition to the petition for certiorari sought to defeat this Court's jurisdiction to review the judgment upon a lump sum general verdict as resting upon an adequate nonfederal ground (Br. in Op., pp. 10-13) under a Jurisdictional Rubric:

> "A. THERE WAS AMPLE EVIDENCE OF COMMON LAW FRAUD AND VIOLATIONS OF THE INVESTMENT ADVISERS ACT."

(5) Petitioner's reply brief dated November 2, 1978 argued (pp. 6-8) under contrary Jurisdictional Rubric:

"I. RESPONDENT CANNOT CARVE OUT ANY STATE GROUND."

(6) This Court's November 26, 1979 order in this case by the exercise of jurisdiction necessarily determined that this Court had jurisdiction and that there was no adequate nonfederal ground to support the general verdict and this Court's single instruction was to reconsider in light of dismissal of a nonexistent purported federal claim for money damage.

(7) The April 3, 1978 oral decision by Respondent Judge Timbers (pet. for cert. app. A23-A25) directly and expressly upheld the general verdict under the Investment Advisers Act and a Rule thereunder, as follows (A24):

> "We hold that plaintiff presented sufficient evidence from which the jury could have found that Rule 206(4)-1(a)(3) was violated . . ."

(8) This Court's exercise of jurisdiction to vacate the judgment necessarily determined that the same general

verdict could not be sustained on any adequate nonfederal ground, as had been upheld by Respondent Judge Timbers' next sentence (Pet. appendix A-24):

> "Moreover, Chestnutt's intentional failure to disclose its prior performance in bear markets we hold constituted a sufficiently material non-disclosure to support a jury finding of common law fraud."

(9) Petitioner's "Supplemental Brief, etc. . . ." on remand from the Supreme Court physically annexed and incorporated the petition for certiorari granted by this Court in No. 78-463 as well as petitioner's Reply Brief (dated November 2, 1978) and Supplemental Brief submitted to this Court (dated October 15, 1979), both in support of certiorari.

(10) On March 31, 1980 Respondent Judges on remand decided that their April 3, 1978 judgment "remains unaffected" and overruled this Court's jurisdictional determination, and Respondents can be corrected only by the issuance by this Court of its writ of mandamus to Respondents to prevent the defeat of this Court's appellate jurisdiction.

Wherefore, petitioner prays that a writ of mandamus issue from this Court directed to the Honorable Respondents and the United States Court of Appeals for the Second Circuit requiring said Respondents to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable William H. Timbers, Honorable Ellsworth A. Van Graafeiland, Honorable Sterry R. Waterman and the Honorable United States Court of Appeals for the Second Circuit to show cause on a day to be fixed by this Court why mandamus

should not issue from this Court directing said Honorable Judges thereof and the United States Court of Appeals for the Second Circuit to vacate and expunge from the record the order of March 31, 1980 directing affirmance upon the 1975 general jury verdict and directing entry of an order by said Honorable Respondents ordering dismissal of the complaint and that petitioner have such additional relief as may be necessary and appropriate in the circumstances.

Respectfully submitted,

.....

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BRIEF IN SUPPORT OF AND REASONS FOR GRANTING THE WRIT OF MANDAMUS

Petitioner "prevailed in this Court" and "its remedy is by motion for leave to file a writ of mandamus . . ." *Vendo Company* v. *Lectro-Vend Corporation, et al.*, 434 U.S. 425, 427-428 (1978). *General Atomic Company* v. *Feltner*, 436 U.S. 493 (1978).

A recent instruction of this Court, *O'Connor* v. *Donaldson*, 422 U.S. 563, at 579, Note 12 (1975) reads:

> ". . . Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case. See *United States* v. *Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36".

Respondent Judges have "deprive[d]" this Court's judgment of "precedential effect" and substituted their prior judgment as the "sole law of the case".

In *United States* v. *Munsingwear*, 340 U.S. 36 (1950) Mr. Justice Douglas stated (340 U.S. at 38):

> "We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355:
>
> > 'The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the

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> second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'"

For a purported nonfederal ground to survive this Court's judgment, *sub silentio,* means that this Court had no jurisdiction to do what it did. That is precisely what Respondent Judges held in defeating this Court's appellate jurisdiction by declaring the five-year old *general* jury verdict to have survived this Court's exercise of judicial power.

Just as Congress knows how to create a federal cause of action when it intends to do so, likewise this Court knows how expressly to order a new trial in an eight-year old case of a possible nonfederal claim when the Court intends to do so.

We have not found elsewhere a holding on remand that this Court exceeded its jurisdiction *sub silentio.*

The more strenuously Respondent Miller opposed granting the writ on purported common law ground, the more surely she established as *res judicata* the inadequacy of any state ground.

Respondent Judges held in effect that this Court simultaneously granted the writ and dismissed the writ as improvidently granted. See *Hughes Tool Co.* v. *TWA,* 409 U.S. 363, 365, Note 1 (1973).

Where this Court exercised its jurisdiction on the merits, "This Court then necessarily decided (1) that it had jurisdiction . . ." (*United States* v. *United States District Court, United States* v. *Haley,* 371 U.S. 18 (1962)) in a

prior appeal (358 U.S. 644), and accordingly granted the writ of mandamus.

Since this Court's very jurisdiction depended upon there being no adequate state ground to support the general verdict of the jury, charged upon a nonexistent federal claim, Respondent Judges ". . . strike[.] at the heart of [this Court's] mandate . . .". *Utah Public Service Comm.* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 468 (1969).

The ALPHA of this case (pet., p. 4) was:

> "This case indicted a book published in 1952 (17th Ed., copyright 1969 with factual tabulations through 1968, in evidence to the jury in 1975 as Ex. 5) and punished the author. Not only its quarter-century old cartoons, but also a ten-column copyrighted magazine article written in *Medical Economics* (Ex. 4) by its Senior Editor, constituted federal securities "fraud", as did some 75 weekly letters of opinion published worldwide (Ex. 3)."

The OMEGA of this case (Supplemental Br. dated October 15, 1979, p. 9) was:

> "Respondent elected the federal court, assuming an impenetrable dark rain forest of 'securities laws' and 'implication'. The searchlights of recent decisions of this Court blazingly illuminate that her suit is amorphous in all respects, except that the clear shape of the First Amendment was targeted to the jury which hit its exercise with punitive damage."

We do not read this Court's decisions as receding from "free speech", commercial or otherwise. *Consolidated Edison, etc.* v. *Public Service Comm., etc.*, 48 L.W. 4776; *Central Hudson Gas & Electric* v. *Public Service Comm., etc.*,

48 L.W. 4783; *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia,* 48 L.W. 5008. As to punitive damage for expression of financial opinion, we quote Justice Stevens, concurring in *Central Hudson* (48 L.W. at 4789):

> "Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience."

In *Richmond Newspapers,* we note the Chief Justice's quotation (48 L.W. at 5013):

> "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 783 (1978)."

If, instead of the *general* verdict herein, there had been a *special* verdict under the Advisers Act and a *special* verdict under purported common law, this Court could well have elected to dispose of the case expressly under the First Amendment, passing over entirely this lawsuit's utter insufficiency, even as a pleading under Rule 9(b), F.R.Civ.Pr. See Justice Brandeis, concurring, *Ashwander* v. *TVA,* 297 U.S. 298, 341 (1936).

As stated in our Supplemental Brief dated October 15, 1979 (p. 3):

> "The pleadings* [A 31-A 42] show that respondent could not redraft her complaint to circumvent the

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* As pointed out in our Petition (p. 14), the charge to the jury in October 1975 preceded by several months this Court's decision in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976).

First Amendment, since publication of opinion is the gist and essence.

"In short, this suit never was, and never can be, either federal fish or state fowl."

* * *

This advisory agreement, terminable and in fact terminat*ed* at will and not requiring "rescission" (the sole remedy under *Transamerica, supra*), was entered into February 16, 1969. Six months later *Forbes Magazine* (August 15, 1969 Issue, at page 69) conferred on a different client of petitioner, American Investors Fund, Inc., a "D" grade, even though that mutual fund for an eight-year period (including four "up" markets and four "down" markets as defined by *Forbes*) was listed by *Forbes* itself as second *best* of 183 mutual stock funds for the entire period, which *Forbes's* own proprietary index moved up from $100 to $408 in the eight years, while moving up Standard & Poor's 500 Average from $100 to $178. (*Forbes*, August 15, 1969, pp. 50-51, 61-64, 69-71).

Respondent Miller's argument against this Court's *jurisdiction* was that such *post-hoc* third-party calumny (or misprint?)—that petitioner ". . . had received the lowest rating given by *Forbes* magazine", standing alone, was a "non-disclosure sufficient in itself to support a jury finding of common law fraud." (Brief in opposition to Petition for Certiorari, pp. 10-13).

This Court's grant of the writ and summary vacation of judgment necessarily adjudicated that third-party calumny of a different advisory client could not be hybridized with fraud by hindsight as a common law "sport" to defeat this Court's exercise of jurisdiction.

In the light of the *general* jury verdict on a nonexistent federal statutory claim, this Court did not see fit to remand

to consider whether it was "harmless error" to send a book to the jury to determine its orthodoxy. This Court did not remand to consider whether it was "harmless error" to conduct ". . . a Scopes Trial of stock market opinion resulting in automatic punitive damage, as well as the Sedition Law of financial writing." (Pet. Reply Brief, p. 2).

Respondent Judges' "Order on Remand From Supreme Court" Demonstrates Complete Misapprehension of This Court's Mandate

Since a large proportion of "securities" litigation is concentrated in this Circuit, it is all the more important that mandates of this Court be correctly apprehended, whatever the fervor with which any Judges have pursued contrary thought patterns as to the role of Congress under Article I of the Constitution and Separation of Powers.

Neither litigants nor lower courts should purport to school "one Supreme Court" to require a detailed opinion before the drift can be perceived of vacating a judgment in its entirety.

Nor is it for litigants or inferior courts to school this Court as to any separate or partial ground upon which this Court might have acted, or to presume a "vacated" judgment "remains unaffected" unless this Court expressly negates each item on a laundry list of legal possibilities.

Respondent Miller did not ask rehearing here, seeking to bring herself and this general verdict within *New York and New Jersey Sandy Hook Pilot's Ass'n* v. *Halecki,* 358 U.S. 613, 618 (1959) to obtain a new trial, where:

> "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives a right of action, we agree with the Court of Appeals that

> 'the evidence created an issue that could be decided only by a verdict' ".

Rather, on the basis of a trial that punished for exercise of free speech opinion as to financial matters, she pursuaded Respondent Judges to exceed their jurisdiction, and compound error in disregard of the holding in *Halecki, supra,* that the general verdict could not stand, since (358 U.S. at 619) there was:

> ". . . no way to know that the invalid claim of unseaworthiness was not the *sole* basis for the verdict." (Emphasis added)

Where in connection with federal lands the Fifth Circuit had applied federal law, the Court mandated in *Wallis* v. *Pan American Petroleum Corporation,* 384 U.S. 63, 72 (1966):

> "Having concluded that federal law should not govern the present controversy, we vacate the judgment of the Court of Appeals and remand the case to that court so that it may consider any other contentions respondents may have urged, including their claim that they should prevail under Louisiana law."

Failure by the Court of Appeals in *Wallis, supra,* to determine state law, as in *Burks* v. *Lasker,* 441 U.S. 471, 99 S.Ct. 1831 (1979), led to the explicit direction to consider *state* law. By contrast, the mandate herein was to consider dismissal of a federal statutory claim for money damage.

Neither Respondent Miller nor Respondent Judges have found authority for survival *sub silentio* of a nonfederal ground following exercise by this Court of power to decide a federal claim.

Instead, Respondents stand *Erie** on its head on the ground that the April 3, 1978 affirmance by that panel on express ground of "sufficient evidence" for money damage under the Advisers Act was no evidence at all, and petitioner could not have been aggrieved by such harmless error.

The "harmless error" rule does not overrule this Court's jurisdiction.

Nor does any asserted state practice control presentation of purported federal claims in federal courts.

The very cases cited by Respondent Judges require grant of the writ of mandamus.

Stephenson v. *Grand Trunk RR* (7 Cir., 1940) 110 F.2d 401, *cert. dismissed* 311 U.S. 720, relied on by Respondents did not involve *any federal claim.* The court held that an Illinois statute could not prevent a federal court sitting in that State from trying a negligence case arising out of a Michigan accident. The court further held, in the total absence of any federal claim, that an Illinois statute adopting the "two issue" rule should be followed as to that purely common law negligence case to the jury.

Respondent Judges' invocation of *Volasco Products Co.* v. *Lloyd A. Fry* (6 Cir., 1963), 308 F.2d 383, *cert. den.* 372 U.S. 907 (1963) is equally perplexing, since it demonstrates that both *pre-Erie* and *post-Erie,* error as to a federal claim required reversal of a jury verdict. The court held (308 F.2d at 390):

> "The plaintiff Volasco claims that the 'two issue' rule is applicable in Tennessee and that, if other issues were properly submitted to the jury, there can be no reversal because of an error in the submission of one

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* Erie RR. v. Tompkins, 304 U.S. 64 (1938).

issue. The plaintiff cites two cases from the Sixth Circuit, in support of this theory. *Louisville & Nashville Railroad Company* v. *Rochelle,* 252 F.2d 730, C.A. 6, and *Atlantic Coastline Railroad Company* v. *Smith,* 264 F.2d 428, C.A.6. These cases are both diversity cases tried in Tennessee where the two-issue rule prevails (*Tennessee Central Ry. Co.* v. *Umenstetter,* 155 Tenn. 235, 291 S.W. 452) and under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, the District Court must follow the substantive law of the state. Tennessee and Ohio are the only states in the Sixth Circuit to follow this rule. This case is tried under federal law where the 'two-issue' rule is not applicable. *Wilmington Star Mining Co.* v. *Fulton,* 205 U.S. 60, 78, 79, 27 S.Ct. 412, 51 L.Ed. 708; *Baltimore and O.R. Co.* v. *Reeves,* 10 F.2d 329, 330, C.A.6; *Chicago and N.W. Ry. Co.* v. *Garwood,* 167 F.2d 848, 857, C.A.8; *Roth* v. *Swanson,* 145 F.2d 262, 269, C.A.8; *Atlantic Coast Line R. Co.* v. *Tiller,* 142 F.2d 718, C.A.4."

Respondent Judges further mistook fundamental principles as to federal questions in federal courts by failing to apprehend that properly charged *special* verdicts on separate state grounds might preserve them from the required new trial as to an erroneous *general* verdict on two federal grounds. *Morrissey* v. *National Maritime Union of America* (2 Cir., 1976), 544 F.2d 19, 26-27.

The Supreme Court acted upon this case in its entirety. The grant of certiorari was not limited.*

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* Our first "Question Presented" (pet. for cert., pp. 2-3) included:

"—and—

—Where, no security or transaction was alleged, or even identified to involve fraud under federal *or state law*;" (Emphasis added)

This Court vacated the judgment upon a general verdict by order written in plain text not permitting subsequent cryptanalysis below to divine that this Court never had jurisdiction to do what in fact this Court had done.

CONCLUSION

The petition for writ of mandamus should be granted in accordance with its terms.

Respectfully submitted,

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Dated: July 28, 1980

APPENDIX TO
PETITION FOR MANDAMUS

Order on Remand from Supreme Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-7530

ELEANOR C. MILLER,

Plaintiff-Appellee,

v.

CHESTNUTT MANAGEMENT CORPORATION and CHESTNUTT CORPORATION,

Defendants,

CHESTNUTT MANAGEMENT CORPORATION,

Defendant-Appellant.

The Supreme Court on November 26, 1979, *Chestnutt Management Corp.* v. *Miller,* No. 78-463, 48 U.S.L.W. 3355 (U.S. Nov. 27, 1979), having vacated the judgment of our Court entered April 3, 1978, 578 F.2d 1368, and having remanded the case to our Court for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. —— (1979), 48 U.S.L.W. 4001 (U.S. Nov. 13, 1979); and

Our Court having invited the parties to file supplemental briefs to enable us to reconsider the case in light of the Supreme Court's mandate, said supplemental briefs having been filed and having been duly considered by us; it is therefore

ORDERED, ADJUDGED and DECREED that the judgment of the district court be, and the same hereby is, *affirmed,* for the reasons which follow.

Order on Remand from Supreme Court

This Court originally affirmed the judgment of the district court, holding that the evidence at trial was sufficient to support the jury verdict for appellee on both her claim based on common law fraud and her claim based on a violation of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6 (1976). In light of the Supreme Court's decision in *Transamerica Mortgage Advisors, supra,* we hold that appellee's claim under the Investment Advisers Act no longer is viable and, to the extent the judgment was based on that claim, the judgment stands vacated. Our decision of April 3, 1978, however, expressly held that the common law fraud claim was properly submitted to the jury and was fully supported by the evidence at trial. This part of our judgment remains unaffected by the Supreme Court's order.

Appellant contends that since the jury returned a general verdict in this action, we cannot affirm the judgment of the district court as properly founded on the common law fraud claim. We disagree. Under the law of Connecticut, applicable to the common law fraud claim,

> "it has ever been considered to be the rule that where a complaint is divided into counts and a general verdict is rendered, if any of the counts are good, it will be presumed that the damages were assessed as to that count and the verdict will be sustained."

Ziman v. *Whitley,* 110 Conn. 108, 112 (1929); *accord, Filisko* v. *Bridgeport Hydraulic Co.,* 176 Conn. 33 (1978).

Since the Supreme Court has "stripped this case of its federal aspects", Brief for Appellant at 2, leaving only the state common law fraud claim (which is still supported by diversity jurisdiction), we hold that the substantive

law of Connecticut should govern the validity of the jury verdict upholding that claim. *Adkins* v. *Ford Motor Co.*, 446 F.2d 1105, 1108 (6 Cir. 1971); *Stephenson* v. *Grand Trunk Western R.R.*, 110 F.2d 401, 406-07 (7 Cir.), *appeal dismissed*, 311 U.S. 720 (1940). *Morrissey* v. *Nat'l Maritime Union of America*, 544 F.2d 19, 26-27 (2 Cir. 1976), is not to the contrary. Our Court there did not address the question now before us, namely, whether a *state* rule concerning general verdicts governs the validity of a jury verdict supported by a *state* common law claim. The *Morrissey* Court simply established the rule applicable to federal claims. *Accord, Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 390 (6 Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

In summary, since the common law fraud claim was submitted properly to the jury, and the evidence at trial clearly was sufficient to support the jury verdict for appellee on that claim, we affirm the judgment of the district court.

/s/ STERRY R. WATERMAN
Sterry R. Waterman

/s/ WILLIAM H. TIMBERS
William H. Timbers

/s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland
Circuit Judges.

Dated at New York, N.Y.
this 1st day of
March, 1980.

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-7530

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of May, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. STERRY R. WATERMAN

Circuit Judges.

ELEANOR C. MILLER,

Plaintiff-Appellee,

v.

CHESTNUTT MANAGEMENT CORPORATION and CHESTNUTT CORPORATION,

Defendants,

CHESTNUTT MANAGEMENT CORPORATION,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant Chestnutt Management Corp.,

Denial of Petition for Rehearing

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

Denial of *En Banc* Suggestion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-7530

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of May, one thousand nine hundred and eighty.

ELEANOR C. MILLER,

Plaintiff-Appellee,

v.

CHESTNUTT MANAGEMENT CORPORATION and CHESTNUTT CORPORATION,

Defendants,

CHESTNUTT MANAGEMENT CORPORATION,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant Chestnutt Management Corp., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Denial of En Banc Suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

Supreme Court, U. S.
FILED
SEP - 2 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-163

IN RE
CHESTNUTT MANAGEMENT CORPORATION,
Petitioner,

v.

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, CIRCUIT JUDGES, AND THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

and

ELEANOR C. MILLER,

Respondent.

BRIEF OF THE RESPONDENT, ELEANOR C. MILLER, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

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In The

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-163

IN RE
CHESTNUTT MANAGEMENT CORPORATION,
Petitioner,

v.

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, CIRCUIT JUDGES, AND THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

and
ELEANOR C. MILLER,

Respondent.

BRIEF OF THE RESPONDENT, ELEANOR C. MILLER, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

PRELIMINARY STATEMENT

The respondent, Eleanor C. Miller ("Mrs. Miller"), respectfully requests that this Court deny the petition of Chestnutt Management Corporation ("Chestnutt") for a writ of mandamus as well as Chestnutt's motion for leave to file such a petition.

The motion and petition arise from a decision, dated March 31, 1980, of the United States Court of Appeals for the Second Circuit, which, upon remand from the United States Supreme Court, affirmed a judgment based on a jury verdict in the United States District Court for the District of Connecticut in favor of Mrs. Miller in the amount of $53,000. Chestnutt subsequently moved before the Court of Appeals for a rehearing and suggested a rehearing *en banc.* That motion and the suggestion were denied by orders of the Second Circuit dated May 28, 1980.*

JURISDICTIONAL STATEMENT

To the extent this Court has jurisdiction in this case to issue a writ of mandamus, jurisdiction is based upon 28 U.S.C. §1651(a) as set forth in Chestnutt's petition at page 10.

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Second Circuit acting in conformance with this Court's November 26, 1979 order in *Chestnutt Management Corp.* v. *Miller,* 444 U.S. 959 (1979) in reaffirming its prior judgment in favor of Mrs. Miller on the basis of defendant's common law fraud alone?

2. Was the United States Court of Appeals correct in applying Connecticut law in reaffirming the judgment in favor of Mrs. Miller where the case had been submitted to the jury on claims arising under both state and federal law and affirmed as to both claims and when the claim under federal law was subsequently held invalid by this Court?

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*The March 31, 1980 and May 28, 1980 orders of the Court of Appeals are printed in full at pp. 1a-7a of the Appendix to the petition for a writ of mandamus.

3. Is a writ of mandamus an available remedy to review a claim of First Amendment protection for commercial practices and communications which have been found to be misleading, deceptive and fraudulent, especially when such a claim was not raised on remand and only tangentially argued on the original appeal? Assuming there is jurisdiction, is there any merit to the claim that the First Amendment protects such commercial speech?

STATEMENT OF THE CASE

Mrs. Miller commenced this action against Chestnutt for money damages in 1972. After a three day trial in October, 1975 the case was submitted to a jury on two claims: that Chestnutt had (1) committed fraud at common law, and (2) violated Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6.* The jury of six returned a general verdict in favor of Mrs. Miller in the amount of $53,000. Chestnutt did not request a special verdict and did not submit any interrogatories to the jury.

Following the jury verdict, Chestnutt moved for a new trial or, in the alternative, for judgment notwithstanding the verdict. The motion was denied by order of the trial judge, Thomas J. Murphy, on September 19, 1977.

Chestnutt appealed the order to the United States Court of Appeals for the Second Circuit which affirmed the judgment and order in a unanimous decision rendered from the bench after oral argument on April 3, 1978. 578 F.2d 1368 (2d Cir. 1978). In accordance with its local rule, the Second Circuit

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*The substantial amount of evidence supporting the claims that Chestnutt had committed fraud at common law and violated the Investment Advisers Act was briefly reviewed in Mrs. Miller's brief, dated October 20, 1978, in opposition to Chestnutt's petition for certiorari previously filed with this Court (No. 78-463).

panel issued a short oral statement setting forth the reasons for its decision. The statement made clear that the Second Circuit affirmed the District Court judgment both on the ground that Chestnutt had violated the Investment Advisers Act and on the basis that Chestnutt had committed common law fraud:

> Moreover, Chestnutt's intentional failure to disclose its prior performance in bear markets we hold constituted a sufficiently material non-disclosure to support a jury finding of common law fraud.*

Chestnutt subsequently petitioned the Court of Appeals for a rehearing and suggested *en banc* consideration. The petition and suggestion were denied without exception and Chestnutt filed a petition for certiorari in this Court on September 18, 1978 (No. 78-463).

Both Chestnutt's petition and Mrs. Miller's brief in opposition presented, *inter alia,* the question of whether a private right of action existed under the Investment Advisers Act. While Chestnutt's petition was pending, this Court decided *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 100 S. Ct. 242 (1979) and held that:

> there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment adviser's contract, but that the Act confers no other private causes of action, legal or equitable.

444 U.S. 11, 24, 100 S.Ct.242, 249 (1979).

Less than two weeks later, on November 26, 1979, the Supreme Court issued the following order in this case:

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*The complete statement of the Court of Appeals is found at pages A23-A25 of the appendix to Chestnutt's petition for certiorari in No. 78-463.

> Motion of Investment Counsel Association of America, Inc. for leave to file a brief, as *amicus curiae* is granted. Petition for a writ of certiorari is granted. Judgment is vacated and case remanded to the Court of Appeals for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* _____ U.S. _____ (1979).

444 U.S. 959, 100 S. Ct. 443 (1979).

On remand, the United States Court of Appeals for the Second Circuit, after ordering the original District Court judgment vacated, took the case under reconsideration. Following the submission of briefs, the Second Circuit panel (Waterman, Timbers and Van Graafeiland, JJ.) reaffirmed the original judgment on the grounds of Chestnutt's common law fraud in the following words:

> This Court originally affirmed the judgment of the district court, holding that the evidence at trial was sufficient to support the jury verdict for appellee on both her claim based on common law fraud and her claim based on a violation of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6 (1976). In light of the Supreme Court's decision in *Transamerica Mortgage Advisors, supra,* we hold that appellee's claim under the Investment Advisers Act no longer is viable and, to the extent the judgment was based on the claim, the judgment stands vacated. Our decision of April 3, 1978, however, expressly held that the common law fraud claim was properly submitted to the jury and was fully supported by evidence at trial. This part of our judgment remains unaffected by the Supreme Court's order.

Following the Second Circuit's decision, Chestnutt moved for a rehearing and suggested a rehearing by the Court of Appeals *en banc.* The motion and suggestion were denied by orders dated May 28, 1980.

Chestnutt has now moved before this Court seeking an order requiring Judges Waterman, Timbers and Van Graafeiland and the Second Circuit Court of Appeals as a whole to show cause why a writ of mandamus should not issue requiring them to dismiss this action in its entirety.

ARGUMENT

POINT I

THE COURT OF APPEALS' ORDER COMPLIED WITH THE SUPREME COURT'S ORDER OF REMAND. THE PETITIONER'S THEORY THAT THE SUPREME COURT'S ORDER OF REMAND REQUIRED A DISMISSAL OF THE ACTION IS WITHOUT FOUNDATION.

The Supreme Court has repeatedly held that the issuance of a writ of mandamus, which is sought in this action by Chestnutt, is limited to the most exceptional and extraordinary circumstances requiring drastic remedies. See e.g. *Kerr* v. *United States District Court,* 426 U.S. 394 (1976); *Will* v. *United States,* 389 U.S. 90 (1967). Mandamus has been used only to confine a lower court to its proper jurisdiction. *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21 (1943). It has been directed to a lower court only when there has been a usurpation of judicial power or a clear abuse of power or discretion. *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379 (1953); *DeBeers Consolidated Mines* v. *United States,* 325 U.S. 212 (1945).

Chestnutt's petition for the extraordinary writ of mandamus contends that this Court's November 26, 1979 order in this case left the Court of Appeals no discretion on the remand and that the order was tantamount to a dismissal of the complaint in its entirety. Such a contention disregards the plain and unambiguous language of this Court's order, which remanded the case for "further consideration in light of" *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979). Neither the language nor the intent of this "well-established practice of a remand for consideration in light of a subsequent decision," *W.M.C.A., Inc.* v. *Simon,* 370 U.S. 190, 191 (1962), constituted a decision on the merits of this case nor a direction for the Court of Appeals to dismiss the action.

This Court's order of vacation and remand "in light of *Transamerica* v. *Lewis*" contains no hint that the Court rendered a decision on, or even considered, the merits of any claim presented by the parties and, *a fortiori,* there is no indication, implicit or explicit, that the Supreme Court held the plaintiff's common law fraud cause of action to be unsupported or inadequate.

The granting of the petition for certiorari was necessary for the Supreme Court to exercise its jurisdiction at that stage of the proceedings. The corollary orders to vacate and remand addressed none of the questions presented in Chestnutt's petition and are entirely neutral as to the merits of the case. If this Court had reached the merits of the common law fraud claim, it certainly had the power to affirm or reverse the judgment. Having done neither, its order cannot be read to reverse *sub silentio* the Court of Appeals' explicit affirmance of the common law fraud claim.

Although its brief is not clear, Chestnutt appears to contend that this Court, upon holding in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra* that no private right of action for damages existed under the Investment Advisers Act and exercising its certiorari jurisdiction to vacate the judgment in this case and remand the case to the Court of Appeals, by implication held that plaintiff's common law fraud cause of action was inadequate or faulty. This convoluted, and at best speculative, argument is based on a misunderstanding of the proper application of the Supreme Court's discretionary doctrine of "adequate state grounds". This doctrine, of course, is generally applied in review of cases arising from state courts under the limited jurisdictional grounds of 28 U.S.C. §1257. It is not applicable to the general comprehensive and unlimited supervisory appellate jurisdiction which the Supreme Court has over federal court cases under 28 U.S.C. §1254. See *Forsyth* v. *Hammond,* 166 U.S. 506 (1897). Furthermore, Chestnutt's argument quite ignores the plain fact that having held in *Transamerica* that no cause of action for damages exists under the Investment Advisers Act, this Court, if it had held that Mrs. Miller's com-

mon law fraud claim was also invalid, would have reversed the Court of Appeals judgment rather than order a remand for further consideration.

An argument analogous to Chestnutt's was presented and soundly rejected in *United States* v. *National Society of Professional Engineers.* In that case, the District Court initially entered judgment for the plaintiffs on claims brought under the Sherman Anti-Trust Act. 389 F. Supp. 1193 (D.C. 1974). On direct appeal to the Supreme Court the judgment was vacated and remanded for consideration in light of the Court's then recent decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). *National Society of Professional Engineers* v. *United States,* 422 U.S. 1031 (1975). On remand, the defendants argued that because the case was not affirmed by the Supreme Court the total implication was that the judgment for plaintiff should be reversed. Both the District Court, which re-entered judgment for the plaintiff (404 F. Supp. 457) and the District of Columbia Court of Appeals rejected this contention, with the latter court stating:

> We see no warrant for this speculative reconstruction. The Supreme Court had just decided *Goldfarb;* instead of taking the time to engage in a detailed study of cases involving closely related issues, it requested the district court to do so.

555 F.2d 978, 982 (D.C. Cir. 1977). This Court agreed and affirmed the judgment for the plaintiff after specifically noting its previous remand and the subsequent re-entry of the original judgment. 435 U.S. 679 (1978).

In *Henry* v. *City of Rock Hill,* 375 U.S. 6 (1963) the Supreme Court granted certiorari, vacated a judgment against Henry and others, and remanded the case to the Supreme Court of South Carolina for further consideration. The South Carolina Supreme Court concluded that the remand was not a determination on the merits, and this conclusion was thereafter explicitly approved by the Supreme Court, which described its practice of

remand for consideration in light of a subsequent decision, as follows:

> That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the State Court for reconsideration.

Henry v. *City of Rock Hill,* 376 U.S. 776 (1964).

By its order of remand, dated November 26, 1979, this Court simply instructed the Second Circuit to consider further its prior judgment in favor of Mrs. Miller by taking into account the *Transamerica* decision limiting a private right of action under the Investment Advisers Act. Chestnutt's argument to the contrary notwithstanding, the Court of Appeals was not limited to considering this action solely in light of the Investment Advisers Act. Neither the Supreme Court decision in *Transamerica* nor its order in this case touched upon or affected the plaintiff's common law fraud claim. The plaintiff was free to urge entry of judgment on any grounds unaffected by the intervening Supreme Court decision and the Court of Appeals was likewise free to take any action not foreclosed by the Supreme Court mandate. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939); *Re Sanford Fork & Tool Company,* 160 U.S. 247 (1895).

This point is made clear in *John Nuveen & Co., Inc.* v. *Sanders,* 425 U.S. 929 (1976), a securities action in which the plaintiff alleged claims under Sections 12(2) and 17 of the Securities Act of 1933 and Sections 10(b) and 20 of the Securities Exchange Act of 1934. The Supreme Court granted a petition for certiorari, vacated an order of the Court of Appeals for the Seventh Circuit in favor of the plaintiff and remanded the case for further consideration in light of its recent decision interpreting Section 10(b) in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976). On remand the Seventh Circuit specifically held that in addition to considering the Section 10(b) claim in the light of *Hochfelder* it was free to examine the other claims set forth by the plaintiff. After determining that *Hochfelder*

required a dismissal of the Section 10(b) claim, the Court of Appeals stated:

> Therefore, at this point, as we now view the case, we must determine whether we are compelled to allow Nuveen's motion for summary reversal of the judgment below, or whether upon remand to this court the permissible scope of our reconsideration is broad enough to permit consideration of other pleaded issues which were originally present in the case and which were not expressly or impliedly ruled upon by the Supreme Court in *Hochfelder.* We may not contravene a specific instruction or disregard the disposition of any question of law contained in the mandate. Nuveen relies on *Hermann* v. *Brownell,* 274 F.2d 842 (9th Cir. 1960), *cert. denied sub. nom., Herrmann* v. *Rogers,* 364 U.S. 821, 81 S.Ct. 56, 5 L.Ed.2d 50, but that case stands only for the proposition that upon remand the jurisdiction of an appellate court is limited to those particularized points which were assigned for consideration, if the mandate was in that form. However, the remand in the present case was broadly stated to be "for further consideration in light of *Hochfelder.*" Other issues not within the compass of the mandate are thereby not precluded from consideration. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 59 S.Ct., 777, 83 L.Ed. 1184 (1939). See also *Illinois Bell Telephone Co.* v. *Slattery,* 102 F.2d 58 (7th Cir. 1938), *cert. denied,* 307 U.S. 648, 59 S.Ct. 1044, 83 L.Ed. 1257 (1939).
>
> Following that view we must next examine the other causes alleged by plaintiff and an additional approach urged by Amicus Curiae.

Sanders v. *John Nuveen & Co., Inc.,* 554 F.2d 790, 793-4 (7th Cir. 1977).

In *Lash* v. *Aikens,* 425 U.S. 947 (1976) the Supreme Court granted certiorari, vacated and remanded the judgment for "consideration in light of" its recent decision in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976) which had held that prison officials were not required to give written reasons for refusing a prisoner the right to cross-examine witnesses in disciplinary transfer hearings. The *Lash* case involved numerous issues of prison procedure and discipline, and, on remand, the Seventh Circuit reinstated its prior opinion and judgment dealing with these issues after striking only the holding requiring written reasons as called for in the *Baxter* decision. *Aikens* v. *Lash,* 547 F.2d 373 (7th Cir. 1976).

The above cases make clear that an order requiring consideration "in light of" a recent Supreme Court decision does not mandate that the Court of Appeals must enter a judgment reflecting that decision only, when the case before it presents other issues and grounds for action. Therefore, the Second Circuit Court of Appeals was free to act on the other ground for affirmance available in this case, and was correct in holding that the part of the judgment based on the common law fraud claim was unaffected by the Supreme Court's decision in *Transamerica.*

POINT II

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT ON THE BASIS OF DEFENDANT'S COMMON LAW FRAUD AND THE GENERAL JURY VERDICT FOR PLAINTIFF

As set forth in Point I, *supra,* the Court of Appeals was free to take any action consistent with the Supreme Court's decision in *Transamerica.* On remand, the plaintiff conceded that her claim under the Investment Advisers Act was no longer a viable cause of action in light of the holding of *Transamerica,* but contended that her claim based on the defendant's fraud at common law remained unaffected by that decision. The case had

been submitted to the jury on counts of both common law fraud and fraud under the Investment Advisers Act. The defendant had not made any request for a special verdict or interrogatories. A general verdict was rendered for the plaintiff in the amount of $53,000. The Court of Appeals had previously found the evidence of fraud adduced by the plaintiff at trial to be sufficient to support a jury verdict for the plaintiff on either or both claims. Thus, to comply with the order of remand in the present case, all the Court of Appeals found it necessary to do was strike from its previous decision the ground for affirming the District Court's judgment based upon Chestnutt's fraud under the Investment Advisers Act, and reaffirm the District Court judgment on the ground of common law fraud.

The Court of Appeals went on to hold, correctly, that the common law fraud claim, supported by diversity jurisdiction, should be governed by the substantive law of Connecticut.

It is settled law in Connecticut that:

> where a complaint is divided into counts and a general verdict is rendered, if any of the counts are good, it will be presumed that the damages were assessed as to that count and the verdict will be sustained.

Ziman v. *Whitley,* 110 Conn. 108, 112, 147 Atl. 370, 372-3 (1929). This rule has been consistently applied by the Connecticut courts. See e.g. *Filisko* v. *Bridgeport Hydraulic Co.,* 176 Conn. 33, 404 A.2d 889 (1978).

The Connecticut rule differs from that occasionally employed in federal court in federal question cases. See, e.g., *Morrissey* v. *National Maritime Union of America,* 544 F.2d 19 (2nd Cir. 1976); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962), *cert. denied* 372 U.S. 907 (1963). However, those cases which have analyzed the effect of a general verdict in diversity cases involving state law questions have consistently held that the appropriate state rule should be followed. *Watts* v. *Mack Trucks, Inc.,* 491 F.2d 601 (6th Cir. 1974); *Keet*

v. *Service Machine Company, Inc.*, 472 F.2d 138 (6th Cir. 1972); *Adkins* v. *Ford Motor Co.*, 446 F.2d 1105 (6th Cir. 1971); *Tracy* v. *Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied* 368 U.S. 826 (1961); *Stephenson* v. *Grand Trunk Western R. Co.*, 110 F.2d 401 (7th Cir.), *app. dismissed* 311 U.S. 720 (1940); *Firemen's Ins. Co.* v. *Follett*, 72 F.2d 49 (7th Cir.), *cert. denied* 293 U.S. 618 (1934).

Since the common law fraud claim asserted by Mrs. Miller was based *in toto* on the law of Connecticut, it is submitted that the Court of Appeals was correct in applying the Connecticut rule set forth in *Ziman* v. *Whitley, supra* and in reaffirming the District Court judgment on the basis of the substantial evidence supporting a finding of common law fraud.

POINT III

MANDAMUS IS NOT AN AVAILABLE REMEDY TO REVIEW THE FIRST AMENDMENT CLAIM OF PETITIONER, BUT IN ANY EVENT THE PETITIONER HAS NOT PRESENTED A FIRST AMENDMENT CLAIM MERITING REVIEW BY THIS COURT

As set forth in Point I, *supra,* the extraordinary writ of mandamus is limited to those circumstances in which a lower court has clearly transgressed the bounds of its jurisdiction or discretionary powers. The writ is not the appropriate remedy when other avenues of review are available especially when the most that can be asserted is that the lower court has ruled in error on matters within its jurisdiction. *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). Mrs. Miller submits that Chestnutt's vague and belatedly raised contention of First Amendment protection is not a matter for consideration by the Supreme Court in this motion and petition. Nevertheless, should this Court choose to treat the petition as one for certiorari, Mrs. Miller reiterates the arguments presented in her original brief in opposition to the petition for certiorari (No. 78-463) that the claimed issue of impairment of First Amendment rights first raised by Chestnutt in its reply brief on appeal in the Court of Appeals does not merit review by the Supreme Court.

Commercial speech, while accorded limited protection under the First Amendment, is properly subject to regulation to insure that the "stream of commercial information flow cleanly as well as freely". *Virginia State Board of Pharmacy* v. *Virginia Citizen Consumer Council,* 425 U.S. 748, 772 (1976). As this Court has stated:

> [A]dvertising that is false, deceptive, or misleading of course is subject to restraint. (citation omitted). Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech....Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

Bates v. *State Bar of Arizona,* 433 U.S. 350, 383 (1979).

Nothing in *Consolidated Edison* v. *Public Service Commission,* 48 U.S.L.W. 4776 (June 20, 1980), *Central Hudson Gas & Electric* v. *Public Service Commission,* 48 U.S. L.W. 4783 (June 20, 1980) and *Richmond Newspapers Inc.* v. *Virginia,* 48 U.S. L.W. 5008 (July 2, 1980), the cases cited by petitioner, undermines this view.

Petitioner would have this Court view the decision and judgment below as a direct infringement of the right to publish financial opinion. This case, however, does not affect the right to publish or express views; very simply, it involves the obligations of Chestnutt, having sought and induced reliance by means of such expression, to act in a way which is not misleading or deceitful. The Court of Appeals correctly ignored petitioner's belated argument that the First Amendment insulated a paid investment adviser from its fiduciary responsibilities not to practice frauds and deceits upon clients.

CONCLUSION

For the foregoing reasons the motion for leave to file a petition for a writ of mandamus and the petition itself should be denied.

Dated: Stamford, Connecticut
August 29, 1980

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-163

IN RE

CHESTNUTT MANAGEMENT CORPORATION,

Petitioner,

—v.—

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND WRIT OF MANDAMUS

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Dated: September 9, 1980

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In the

Supreme Court of the United States

October Term 1980

No. 80-163

In Re

Chestnutt Management Corporation,

Petitioner,

—v.—

Honorable William H. Timbers, Honorable Ellsworth A. Van Graafeiland, Honorable Sterry R. Waterman, Circuit Judges, and the Honorable United States Court of Appeals for the Second Circuit,

Respondents,

—and—

Eleanor C. Miller,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND WRIT OF MANDAMUS

Introduction

Respondent Miller* has not found authority in the near two centuries of this Court for survival of a general verdict upon a non-existent federal claim.

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* Brief of the Respondent, Eleanor C. Miller, in Opposition to Motion For Leave To File Petition For Writ of Mandamus,

Nor has she found authority to resurrect the nonfederal ground adjudicated against her when this Court determined its jurisdiction and exercised its power.

Nor has she even identified any case, jury or nonjury, where a purported non-federal ground has been held to have survived this Court's exercise of jurisdiction and judgment, *sub silentio*.

I.

Respondent Judges Have Defeated This Court's Appellate Jurisdiction.

Respondent Miller treats this case as if it *never purported* to involve a federal question—a case that was pleaded, tried, charged to the jury and affirmed on appeal as a general jury verdict for punitive damage for publication of unorthodox ideas in violation of the Investment Advisers Act (15 U.S.C. §80b, *et seq.*), *i.e.*, heresy.

So to treat this case as if it never transpired on federal ground cannot excuse Respondent Miller's failure to cite, or responsibly to discuss, *New York and New Jersey Sandy Hook Pilot's Association* v. *Halecki*, 358 U.S. 613 (1959), where a general verdict could not stand since there was:

> ". . . no way to know that the invalid claim of unseaworthiness was not the *sole* basis for the verdict." (358 U.S. at 619, emphasis added).

(Discussed, Pet. for Mandamus, pp. 22-23)

Petition For Writ of Mandamus And Brief In Support Thereof (Herein, "Miller Op. to Mandamus"), received by petitioner September 2, 1980.

Respondents Judge Timbers, *et al.* have advised the Clerk by letter dated August 22, 1980 that they will file no opposition unless requested by this Court.

Nor does she attempt to discuss, or even cite, *Sunkist Growers, Inc.* v. *Winkler & Smith, etc.*, 370 U.S. 19 (1962) at 29-30 quoted (Pet. for Mandamus, p. 2) in our "Questions Presented" to show that Respondent Judges had compounded error to defeat this Court's appellate jurisdiction.

In the face of *Halecki, supra,* and *Sunkist Growers, Inc., supra,* it is not surprising that Respondent Miller chooses not to discuss them. Instead of attempting to present legal analysis how this Court's *closing* the door on a general jury verdict upon a non-existent federal claim may nevertheless be obviated through common law recycling to accomplish a retroactive cure, Respondent Miller relies upon a case where this Court *opened* a wide constitutional door. (Miller Op. to Mandamus, p. 7)

In *W.M.C.A.* v. *Simon,* 370 U.S. 90 (1962) where the complaint had been dismissed on its face, this Court stated (at 191):

> "On March 26, 1962, we held in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, that a justiciable federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification. Our well-established practice of a remand for consideration in the light of a subsequent decision therefore applies. As in Scholle v. Hare, 369 U.S. 429, 82 S.Ct. 910, we believe *that the court below should be the first to consider the merits of the federal constitutional claim,* free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination. The judgment is vacated and the case is remanded for further consideration in the light of Baker v. Carr, supra." (Emphasis added).

Here, by contrast, the trial court, the jury general verdict, and the Court of Appeals had already been "first to consider" the very ground which this Court's mandate herein held to be a non-existent federal claim for money damage under the Advisers Act.

Likewise, when this Court *opened* the door under a federal statute in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), the remand in *National Society of Professional Engineers* v. *United States,* 422 U.S. 1031 (1975) was to determine whether the government could pass through the very door thus opened. See 435 U.S. 679 (1978). (Miller Op. to Mandamus, p. 9.)

Where at least *four* sections of two federal securities statutes, with their particularized standards and separate burdens of proof were involved, this Court remanded in *John Nuveen & Co., Inc.* v. *Sanders,* 425 U.S. 929 (1976), for reconsideration in light of *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976), which interpreted only *one* of those *four* statutory provisions. (Miller Op. to Mandamus, p. 10-11.)

In *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), the claim for attorneys' fees was "not directly in issue in the original proceedings. . . It was neither before the Circuit Court of Appeals nor before this Court." (at 168). Therefore, it was not "laid at rest" by the prior mandate. (Miller op. to Mandamus, p. 10, 11.)

The purported common law claim was before the jury, both courts below and was presented to this Court as a jurisdictional bar. (See Pet. Mandamus, paragraphs "(4)" and "(5)", page 13.)

Respondent (Miller Op. to Mandamus, pp. 9, 10) misapprehends deference to the highest State Court, citing *Henry* v. *City of Rock Hill,* 375 U.S. 6 (1963) and 376 U.S.

776 (1964). That remand to consider *whether* an adequate state ground existed consistent with the Constitution differs utterly from this Court's adjudication herein that no adequate nonfederal ground existed to bar this Court's reaching and deciding the federal statutory question.

Just as Respondent Miller has not identified any case, whether reasoned precedent or possible judicial accident, which permitted a nonfederal ground to survive this Court's judgment, *sub silentio*; so likewise, she may not be heard to contend that this Court's tread is too airy to touch upon nonfederal ground through which it must march to reach the territory of a federal statute.

Respondent Miller assails summary disposition of this case. See *Hicks* v. *Miranda,* 422 U.S. 322 (1976). Respondent Judges traverse summary disposition. In *Wolf* v. *Weinstein,* 372 U.S. 633 (1963) this Court decided one statutory question on the merits, and simultaneously dismissed the writ as improvidently granted with respect to a second order "as primarily implicating Pennsylvania law and presenting no federal question of substance."

Here, the Court disposed of this case in its entirety. As in *Cooper* v. *Aaron,* 358 U.S. 1, 17 (1958), this Court's judgments may not be ". . . nullified . . . indirectly through evasive schemes . . . whether attempted 'ingeniously or ingenuously'. *Smith* v. *Texas,* 311 U.S. 128, 132; 61 S.Ct. 164, 166; 85 L.Ed. 84."

Instead of any authority as reasoned argument, she concludes (Miller Op. to Mandamus, p. 15) on the note of "frauds and deceits upon clients", by which she means publication of opinion, since *no* security *or* transaction was ever identified, or "particularized" to involve fraud under state or federal law. The grant of certiorari herein was not limited. (See Pet. for cert., pp. 2-3.)

II.

Respondent Miller's Attempt to Bifurcate the General Verdict and This Court's Judgment Invites Consideration of the First Amendment Issue Already Granted in Our Petition for Certiorari.

Chief Justice Hughes knew how to decide a free speech case as:

> ". . . comprehend[ing] every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938).

When he felt obliged to reach a constitutional issue, Chief Justice Hughes knew how to reach it. *Ashwander* v. *TVA,* 297 U.S. 298 (1936). Heresy is unconstitutional.

Since this case involves the conduct of jury trials in federal courts and appeals therefrom, few, if any, of the considerations mentioned by Justice Brandeis, concurring, in *Ashwander* (297 U.S. at 341) obtain.

No state or federal statute is now involved.

It is not a gratuitous undertaking for this Court in the present posture of this case to focus upon the trial of opinion herein.

Indeed, as the Court of Appeals judgment now stands, there has been the most flagrant violation of petitioner's First Amendment rights on a common law theory. No clearer case could be made for exercising this Court's supervisory jurisdiction than to require protection of this fundamental right, whether a trial is in the guise of common law or purportedly of a statutory claim.

After three decades of publishing, petitioner is not more amenable to being burned at the stake with common law faggots than with statutory oil. (See Pet. for Cert., pp. 11-16; see Petitioner's Reply Brief dated November 2, 1978, pp. 2-8.)

CONCLUSION

The petition for writ of mandamus should be granted in accordance with its terms.

Respectfully submitted,

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Dated: September 9, 1980